agreement that there should be monthly payments to the beneficiaries until distribution is not inconsistent with this view; nor the proviso that in the event of the revenues of the estate being insufficient to meet them they should be proportionately reduced. It was only an arrangement for interim payments on account which would not unnaturally find a place in any agreement postponing the date of distribution. For the respondent it was contended that the effect of the agreement was to constitute the appellant as from 17th March 1924 a trustee for each beneficiary of specific shares in the residuary estate, the income of which would be payable to him, and for which the appellant would be accountable to him. This seems to have been the view of Terrell, J., but their Lordships are unable to accept it as correct. Reading the agreement as a whole, they think that it effected no change in the relationship of the appellant to the beneficiaries. Until the date of distribution arrived there was nothing which the beneficiary could assert to be or to represent his share, and nothing of which he could claim the income; the whole remained vested in the appellant as executrix for the purposes of administration.

It was also suggested in support of the majority judgments that the respondent was entitled by contract, apart from his right as a beneficiary, to his account under Cl.6 of the agreement, which is summarised above. But this was not the basis of the respondent's claim in the Supreme Court and if, as their Lordships hold, the respondent's whole interest in the estate passed under his mortgages it would seem that the right to the account could only be enforced by his transferees. A claim under Cl.6 of the agreement would be in the nature of a claim to specific performance which a Court of Equity clearly would not grant to a plaintiff who had no remaining interest in the estate. A last attempt was made to support the claim upon the respondent's rights as a mortgagor against his mortgagee. But here again it is manifest that this was not the nature of his claim; a suit for a mortgage account would be of an entirely different nature. His equity of redemption was gone and all he could claim against the appellant was the monthly credit of $400 under Cl.11 of the agreement which admittedly had been made. For the reasons above given, their Lordships will humbly advise His Majesty that the appeal should be allowed, the judgments of the trial Court and the Court of Appeal set aside and the action dismissed. The respondent must pay the appellant's costs throughout.

Appeal allowed.

Solicitors for the Appellant—*Logan, Ross & Samuel*, Penang; *Lattey & Dawe*, London.

Solicitors for the Respondent—*Wreford & Thornton*, Penang; *Shelton Cobb & Co.*, London.

[ORIGINAL CIVIL JURISDICTION]

MILLS, J.

August 4, 1933.

[APPELLATE CIVIL JURISDICTION]

HUGGARD, C.J., THOMAS, C.J. (F.M.S.), and GERAHTY, J.

November 20, 1933.

RE ANG TECK SAY.

[SINGAPORE BANKRUPTCIES Nos. 609 & 610 of 1931]

[SINGAPORE CIVIL APPEAL No. 12 of 1933]

Ordinance No. 44 (Bankruptcy) S.114(b)—Motion to commit Bankrupt for not producing books of account, when called upon by the Official Assignee to do so.

The obligation of a Bankrupt to produce the books of account required by S. 114 (a) and (b) of Ordinance No. 44 (Bankruptcy) is an unqualified obligation and if not fulfilled renders the Bankrupt liable to the penal consequences of the section, subject only to the proper exercise of the discretion vested in the Judge to award imprisonment. In considering whether or not a Bankrupt should be committed to prison for failing to produce his books the Court should confine itself to considering only the facts and circumstances relating to the failure to produce those books.

Motion.

The Official Assignee moved for an Order under Ordinance No. 44 (Bankruptcy) S. 114 that the Bankrupt do undergo imprisonment on the ground that the Bankrupt had not produced under subsection (b) of that Section the books required to be kept under subsection (a) of the same section.

C. Wilson (Official Assignee) and Assistant Official Assignee.

D. K. Walters for Respondent (the Bankrupt). Section 114 of Ordinance 44 (Bankruptcy) is penal, (*In re Chop Lo Ban Chuan and Chuan Bee*, Penang Bankruptcy No. 45 of 1924, referred to in Braddell's Law of the Straits Settlements Vol. 2 page 27) and must be construed strictly. It is not the intention of Section 114(b) to punish the Bankrupt for what he is not in a physical position to do. "*Lex non cogit ad impossibilia.*" Compare Section 158(i) of the Bankruptcy Act 1914. Under the English law a Bankrupt is conditionally liable to keep proper books of account and to "preserve" all books of account so kept. Under our section a Bankrupt is liable to keep proper books of account and to "produce" such books. If a Bankrupt deliberately destroyed his books he might be liable under other provisions of the law, but under section 114(b) the obligation is only to produce his books if he has them. If the Court is satisfied that the Bankrupt is not in a position (at any rate when this is not due to any fault of his) physically to produce his books he cannot or at least ought not to be committed under Section 53 of Ordinance 44 (Bankruptcy).

Cur. Ad. Vult.

MILLS, J.—In these proceedings the Official Assignee moves the Court for an Order that the bankrupt Ang Teck Say do undergo such imprisonment as the Court shall think fit because he, having been engaged in trading, to wit, as a provision dealer under the styles of Chop Ang Chuan Bee and Chop Ang Chuan Guan, has not produced such books of account as sufficiently disclose his business transactions and financial position within the three years ending 11th September, 1931. The Order is sought under Section 114(a) of Ordinance No. 44 (Bankruptcy).

The bankrupt, who was represented by Counsel, alleged the following facts:—That when he went to China to raise money, he left a manager one Ang Seck Yeok, in charge of his two chops; that when he returned three months later he found his shops had been seized, the stocks auctioned and his Manager gone; that the Manager had taken away his account books, save such as were seized by the Sheriff; that he did his best to find the Manager, but without success; that he had not known and does not know where the missing books are, and that he is not in a position to produce them.

I find it to have been proved as a fact that the bankrupt has not produced the proper books when called upon by the Official Assignee to do so.

Counsel for the bankrupt argued, however, that the bankrupt is not liable to undergo imprisonment unless it has been proved that it was possible for the bankrupt to produce the books at the time when the Official Assignee called on him to do so: that in the present instance it has been impossible for the bankrupt to produce the books, and therefore the bankrupt is excused by virtue of the maxim "*lex non cogit ad impossibilia.*" I am unable to accept that argument: it involves the insertion of qualifying words in clause (b) of Section 114(a). I am unable to find any sufficient reason why such qualifying words are necessary to be implied; that being so, it is the duty of the Courts to interpret the law as it stands. I construe this clause as imposing on the bankrupt an unqualified obligation to produce the proper books when called upon by the Official Assignee to do so. It is true that the law does not expressly command the preservation of books: but it does not expressly command the keeping of books, yet the business man who fails to keep proper books, does so at the peril of being punished under clause (a); and as I interpret the law, it does not allow a business man to be excused owing to the act of the Manager in whose charge he left his books.

My conclusion is, then, that the bankrupt is liable to undergo imprisonment.

The next question is whether under all the circumstances of this bankruptcy the Court ought to order the bankrupt to undergo imprisonment; for the Court has a discretion in this matter.

In my opinion this is a bad bankruptcy and the conduct of the bankrupt has been reprehensible; bankrupts must be made to realise that if their books are not available, their creditors may be deprived of money which is due to them, and if bankrupts leave their books in the custody of managers who are dishonest or careless, they must take the risk of being punished for depriving their creditors of their dues; I consider it is the duty of the Court to order that this bankrupt shall undergo imprisonment, and accordingly I order that he shall undergo simple imprisonment for a term of two months.

From this decision the Bankrupt appealed to the Court of Appeal. The appeal came on for hearing in Singapore before Sir Walter Huggard, Thomas, C.J. (F.M.S.), and Gerahty, J.

The grounds of appeal are as follows:—

(1) The learned Judge was wrong in holding that the appellant was under an obligation to produce the books mentioned in section 114 (b) of Ordinance No.44 (Bankruptcy) notwithstanding that it was the case of the Official Assignee as stated in the reply of the Assistant Official Assignee on the hearing of the Motion out of which this appeal arises, that it was impossible for the Official Assignee to say and therefore prove whether any such books as are referred to in section 114 (a) of the said Ordinance ever existed.

(2) The learned Judge was wrong in holding that the bankrupt was under any liability to produce the books referred to in section 114 (b) aforesaid even though the appellant was not in a position to do so and even though there was no evidence that it was through any fault of the appellant that he was not in a position to do so.

(3) The learned Judge was wrong in not giving effect in construing section 114 (b) aforesaid to the maxim "*Lex semper intendit quod convenit rationi.*"

(4) The learned Judge was wrong in failing to distinguish between the statutory necessity for supporting the said Motion by an affidavit by some one who was able to swear to the facts therein sworn to and the case of motions properly supportable by the report of the Official Assignee. The learned judge was wrong in not giving due effect to the provisions of Bankruptcy Rule 273 as amended to provide for the necessity of an affidavit as opposed to a report.

(5) The learned Judge was wrong in allowing the Official Assignee on the hear-

ing of the said Motion to rely upon the Public Examination of the appellant in this bankruptcy without reading the whole of it and/or without formally putting in the same in evidence.

(6) The learned Judge was wrong in allowing portions of the Public Examination of the appellant in these proceedings to be relied on by the Official Assignee in support of the said Motion without the same being formally put in evidence or alternatively without making a record of exactly which portions were so read.

(7) The learned Judge was wrong in allowing the said Motion to be supported by the affidavit of one E. N. Taylor the Assistant Official Assignee sworn to and filed herein on the 20th July, 1933, because:—

(a) The said affidavit contained matters of prejudice to the appellant not strictly relevant to the said Motion.

(b) The said affidavit contained incorrect statements subsequently sought to be justified and which the learned Judge was wrong in allowing to be justified as being "fair inferences" from the Public Examination and affidavits previously field in this Bankruptcy, notwithstanding that the deponent was making an affidavit and not a report and notwithstanding the observations of Cozens-Hardy, M. R. in *In re a Debtor*, (1910) 2 K.B. p. 59 at p. 65.

(c) The said affidavit contained an incorrect suggestion that the bailors of the bankrupt were wishing to be released from their bail even though the said bail was still required, the truth being as the deponent well knew that the bailors only desired release if bail was no longer required.

(d) The said affidavit where it referred to the previous affidavits in this bankruptcy and to the Public Examination referred to them insufficiently and /or inaccuratey.

(8) The learned Judge was wrong in not insisting that the Official Assignee was only entitled to rely upon such portions of the Public Examination and on such affidavits as had previously been sworn in this bankruptcy, as had been sufficiently indicated prior to the hearing of the said Motion to the appellant and as were on the hearing formally put in, in evidence.

(9) The learned Judge was wrong in holding that this was "a bad bankruptcy" and that the conduct of the appellant has been reprehensible. There was no evidence fit to be relied upon before the learned Judge to justify either of those findings.

(10) The learned Judge was misled by the said affidavit of E. N. Taylor complained of into imposing a longer sentence than otherwise he would have done and the said sentence is excessive.

(11) The learned Judge ought to have dismissed the said Motion with costs.

Page (*Walters* with him) for the Appellant.

Knowles for Official Assignee (Respondent).

Cur. Ad. Vult.

HUGGARD, C. J.—This was a motion by the Official Assignee to commit the bankrupt under the provisions of section 114 (b) of Ordinance No. 44 (Bankruptcy) on the ground that he had failed to produce his books as required by that section.

On the motion coming on before Mills J. it was admitted that the bankrupt had not produced his books when called upon to do so by the Official Assignee. The relevant facts alleged by the bankrupt were as follows:—

> "That when he went to China to raise money he left a manager, one Ang Seck Yeok, in charge of his two chops; that when he returned three months later he found his shops had been seized, the stocks auctioned, and his manager gone; that the manager had taken away his account books, save such as were seized by the Sheriff; that he did his best to find the manager but without success; that he did not know where the missing books were, and that he was not in a position to produce them."

These allegations were not disputed by the Official Assignee.

It was contended on behalf of the bankrupt, both before Mills, J. and in the Court of Appeal, that section 114 (b) of the Bankruptcy Ordinance must be read subject to the maxim "*Lex non cogit ad impossibilia*"; in other words, that a bankrupt cannot become liable to undergo imprisonment unless it has been proved that it was possible for him to comply with the Official Assignee s direction to produce his books. Mills, J. rejected this contention and held that the section imposed on the bankrupt an unqualified obligation to produce his books when called upon by the Official Assignee to do so.

I agree with the construction placed by Mills, J. on the section in question. In my view the clear and unambiguous meaning of section 114 (b) is that failure to produce the books which are impliedly if not expressly required to be kept by section 114 (a) renders the bankrupt liable to undergo imprisonment. This view is supported by reference to the corresponding section of the English Act. Section 158 of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926, declares that a bankrupt who has failed to keep or to preserve proper books of account is guilty of a misdemeanour; but this is subject to the proviso that a person shall not be convicted under that section if he proves that in the circumstances his omission to keep or to preserve such books was honest and excusable. The local section 114 on the other hand contains no such proviso, and its omission from our Ordinance indicates, in my opinion, an intention on the part of the local legislature that the mere failure by the bankrupt to produce books is sufficient to render him liable to imprisonment, subject only to the proper exercise of the discretion vested in the Judge to *award* imprisonment.

It remains therefore to consider whether the learned Judge in the Court below, in ordering the bankrupt to undergo imprisonment for a term of two months, properly exercised the discretion which the section in question vests in him. In his Grounds of Decision the learned Judge, having arrived at the conclusion that the bankrupt was liable to undergo imprisonment, goes on to observe as follows:—

> "The next question is whether under all the circumstances of the bankruptcy the Court ought to order the bankrupt to undergo imprisonment: for the Court has a discretion in this matter."

With all respect to the learned Judge, and notwithstanding the admission of Counsel for the bankrupt, I do not agree with this observation so far as it purports to indicate that in deciding whether or not a bankrupt ought to be committed to prison under section 114(b) the Court should consider *all the circumstances of the bankruptcy*. In my opinion the Court, in considering whether or not a bankrupt should be committed to prison for failing to produce his books, should confine itself to considering only the facts and circumstances relating to the failure to produce those books. The facts that the bankruptcy generally may be a bad one and that the conduct of the bankrupt has been reprehensible are not, in my view, facts which should enter into consideration of the question whether or not the bankrupt should be imprisoned for non-production of his books. Those are facts which can and should be considered if and when the bankrupt applies for his discharge.

It follows automatically from what I have just said that in my opinion any affidavits filed in support of a motion to commit a bankrupt to prison for non-production of his books should similarly be confined to facts relating to his failure to produce those books, and should not, as in the present case, deal with the general circumstances of the bankruptcy or with the conduct of the bankrupt in relation to matters having no direct connection with the subject-matter of the motion.

The question here therefore is whether, on the relevant facts before the Court relating to the non-production of the bankrupt's books, the order of imprisonment can be upheld. In my opinion it cannot. So far as the affidavits are concerned, it is not disputed that the bankrupt kept the books which the law requires to be kept, and that when he went to China he left these books in charge of a manager; it is not disputed that this manager has disappeared together with the books; there is no evidence that the bankrupt knew that this manager was an untrustworthy person and no evidence that there was any collusion between the bankrupt and his manager regarding the removal or concealment of the books; and it would appear from the uncontradicted affidavits of the bankrupt and other deponents that the bankrupt has made every effort to recover those books.

In these circumstances it appears to me that, although the bankrupt has in fact failed to produce his books as required by section 114(b) and has by his failure rendered himself *liable* to imprisonment, he has not been proved to have been guilty of any such fraud or commercial immorality or even such negligence in connection with the non-production of those books as to justify the imposition upon him of a sentence of imprisonment under the section.

I think therefore that this appeal should be allowed and that the order of the Court below should be set aside.

THOMAS, C. J. (F.M.S.)—This is an appeal by Ang Teck Say, a bankrupt, from a sentence of two months simple imprisonment passed on him by Mills, J. under section 114 of Ordinance 44 (Bankruptcy).

The proceedings commenced after the public examination had been concluded by a notice of motion by the Official Assignee, supported by an affidavit sworn on the 20th of July 1933.

On the same day a notice was served on the bankrupt which reads as follows:—

> "The Official Assignee moves this Honourable Court for an order that the abovenamed bankrupt, Ang Teck Say, do undergo such imprisonment as the Court shall think fit because he; having been engaged in trading, to wit, as a provision dealer under the styles of Chop Ang Chuan Bee and

Chop Ang Chuan Guan, has not produced such books of account as sufficiently disclose his business transactions and financial position within the three years ending 11th September, 1931."

The bankrupt thereupon swore an affidavit dated the 15th July, 1933. Therein the bankrupt does not deny that his books were not produced, but he sets out a number of circumstances by which he attempts to explain the reason why the books were not produced. He also complains that the Assistant Official Assignee has referred to extraneous matters with a view to prejudicing the mind of the learned Judge and thereby increasing any sentence which might be passed upon him.

Two further affidavits were sworn on behalf of the bankrupt, which relate to the disappearance of Ang Seck Yeok, who, according to the affidavit of the bankrupt, was in charge of his business and books during his absence from Singapore.

No affidavit in reply to the bankrupt's affidavit was sworn or filed by the Assistant Official Assignee. The material portions of section 114 are as follows:—

"At any time after the public examination of the debto , a Judge may, if he thinks fit, order the bankrupt to undergo imprisonment of either description for a term which may extend to three months, if it appears to him that the bankrupt,

(*a*) having been engaged in trading or other business has not kept such books of account as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy or within such shorter period immediately preceding that event as the Judge deems reasonable under the circumstances;

(*b*) having been engaged in trading or other business has not produced such books as are mentioned in paragraph (*a*) when called upon by the Official Assignee to do so."

The learned Judge held that the intention of the section was that as soon as it had been proved that the books had not been produced the charge had been made out and that it was not permissible to the bankrupt to advance any excuse for their non-production as an answer to the charge.

Mr. Page who appeared for the bankrupt on this appeal argued that just as the words 'at any time after' had been amplified by the Court of Appeal (in a case which is not reported), so, the words 'has not produced such books' should be amplified by the addition of some words such as 'without good reason.'

In my opinion the words 'at any time after' might well be considered indefinite and so require interpretation by the Court; but that indefiniteness does not exist in the expression 'has not produced such books.' If the legislature had desired to allow of any excuse, then words would have been introduced to indicate in what way and to what extent that excuse might be made. It is noticeable that in paragraph (a) of section 114 words are introduced to give the Judge a discretion as to the period immediately preceding the bankruptcy in respect of which books should have been kept. In my opinion, therefore, the learned Judge was right in holding that the charge had been made out, and also in not entertaining the bankrupt's explanation at that stage of the proceedings.

The learned Judge then proceeded to pass sentence, and in doing so he gave the following reasons:—

"In my opinion this is a bad bankruptcy and the conduct of the bankrupt has been reprehensible; bankrupts must be made to realise that if their books are not available their creditors may be deprived of money which is due to them, and if bankrupts leave their books in the custody of managers who are dishonest or careless, they must take the risk of being punished for depriving their creditors of their dues. I consider it is the duty of the Court to order that this bankrupt shall undergo punishment."

The words 'a Judge may, if he thinks fit' in section 114 give a discretion as to the amount of sentence to be passed subject to a maximum of three months. That discretion must of course be exercised judicially.

In my opinion a bankrupt can only be punished for the non-production of the books and not for any other bankruptcy offence or for any misconduct not connected with the non-production of the books. Neither his general conduct nor his general character should be gone into. In considering what sentence should be passed, the Judge is entitled to take notice of any facts connected with the non-production of the books and any reason advanced by the bankrupt for their non-production. If, for instance, it was proved that the books had been accidentally destroyed by fire, he would presumably pass no sentence at all.

In the present case the learned Judge has not confined himself within the limits which I have set out above, but has considered all the facts connected with the bankruptcy. He has expressed no opinion as to whether he believed the debtor's affidavit or not, or accepted his explanation or not. There was in fact no cross-examination of the bankrupt, and it would be difficult to say on an affidavit alone whether the deponent was telling the truth or not. The learned Judge does not seem to have considered the evidence actually before him, or had sufficient facts on which he could properly exercise his discretion.

In my opinion the discretion has not been judicially exercised, and so much of the order

as inflicts a sentence of two months simple imprisonment must be set aside.

I wish to make it clear the the mere allegation that the books have been entrusted to a manager or other person who cannot be found or who has lost or destroyed them will not alone be sufficient to compel a Judge to pass a nominal sentence. He should further be satisfied that he can believe the statements made by the bankrupt, and that the bankrupt is not in any way responsible for the conduct of the person to whom the books have been entrusted. There may be other matters which will influence the decision, and no attempt has been made to deal exhaustively with the subject in this judgment. In conclusion I wish to say that I hesitate to criticise a practice which I understand has been long followed in the Colony. I would, however, suggest that in charges under section 114 and also in other bankruptcy matters it would be advisable to require oral evidence as to matters deposed to in affidavits.

GERAHTY, J.—I have had the advantage of reading the judgment of the learned Chief Justice with which I am in entire agreement. The only comment I would make on the matters in issue is that in applications or motions of a quasi-criminal nature, such as the motion in question, brought at the instance of the Official Assignee, strict regard should be had, in my opinion, to the fundamental principles of justice which operate for the protection of an accused person in a Court of criminal jurisdiction. In my view, while the averred object of the motion in question was to seek punishment of the appellant for his non-compliance with the peremptory provisions of Section 114 (b) of Ordinance No. 44 (Bankruptcy), the general and serious nature of the implications contained in the affidavit in support have not unnaturally influenced the Court to have regard to, and to mete out punishment to the appellant for delinqueneies entirely unconnected with the specific charge for which he was brought before the Court. That the appellant put up an answer to the specific charge which was not only *prima facie* reasonable, but which was also uncontroverted, is clear from the record. For what then one may ask was the appellant punished?

The answer can only be for matters with which he was not charged and which should not have been presented to the Court.

I agree that this appeal should be allowed and that the order of the Court below should be set aside.

Page (Counsel for the successful Appellant) then applied for costs against the Official Assignee but the Court declined to make any order as to costs. The Court held that inasmuch as the bankrupt had failed to comply with the requirements of section 114 (b) he had *prima facie* rendered himself liable to be committed to prison. It then became the duty of the Official Assignee to bring the matter to the notice of a Judge sitting in bankruptcy in order that the Judge might consider whether, in the circumstances, the bankrupt should be ordered to undergo imprisonment. The Court of Appeal had found that the learned Judge in the Court below had, in committing the bankrupt to prison, incorrectly exercised the discretion vested in him, but that finding did not in any way affect the position of the Official Assignee whose action in bringing the matter to the notice of the Judge was, in the view of the Court of Appeal, perfectly correct.

Solicitors for the Appellant (the Bankrupt) —*Allen & Gledhill.*

[ORIGINAL CIVIL JURISDICTION]

MILLS, J.

September 15, 1933.

M. E. T. K. R. A. R. K. R. ARUNASALAM CHETTIAR

v.

MOHAMED ABDUL LATHEEF MARICAR AND ANOTHER.

[SINGAPORE CIVIL SUIT No. 593 of 1933]

Practice—Amendment of Judgment.

A Judgment against an executor personally can in a proper case be amended to the ordinary form of Judgment *de bonis testatoris et si non de bonis propriis* (Form 4 b in Appendix F. to Rules of Supreme Court in England) even after the Judgment has been passed and entered.

Summons in Chambers.

This was a claim by specially endorsed writ made against the 1st Defendant as the administrator of the estate of Kavena Mohamed Abdul Kader Maricar, deceased and against the 2nd Defendant personally, the cause of action being moneys due on Promissory Notes. The writ was endorsed with a statement that the 1st Defendant was sued as the administrator of the estate of Kavena Mohamed Kader Maricar, deceased. Neither of the Defendants entered appearance. By an oversight Judgment was entered against both Defendants personally. The Plaintiff applied by Summons in Chambers to amend the Judgment by substituting a Judgment in the usual form set out in Form 4b in Appendix F. to the Rules of the Supreme Court in England, against the 1st Defendant as such administrator as aforesaid.

Smith for Plaintiff.

Defendants not represented.

MILLS, J.—There is ample authority for such amendment in English case-law:—

Chapman v. *Gale* (2 Levinz. p. 22: referred to in *Chetle* v. *Lees*, Carthew p. 167= E. R. 90 p. 702).